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In the Supreme Court of the United States

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY AND SALAH EL DIN AHMED MOHAMMED IDRIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioners sued the United States in the Court of Federal Claims, seeking compensation under the Just Compensation Clause of the Fifth Amendment for the value of a Sudanese manufacturing facility destroyed by the United States military. The question presented is as follows:

Whether an alien may sue under the Just Compensation Clause to recover the value of property located abroad that was determined by the President to be enemy property and was destroyed by United States military personnel pursuant to a Presidential directive.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 378 F.3d 1346. The opinion of the Court of Federal Claims (Pet. App. 42a-96a) is reported at 55 Fed. Cl. 751.

JURISDICTION

The court of appeals entered its judgment on August 11, 2004. A petition for rehearing was denied on December 28, 2004 (Pet. App. 97a). The petition for a writ of certiorari was filed on March 24, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1998, following a coordinated terrorist attack on the United States Embassies in Kenya and Tanzania, President Clinton directed the United States Navy to destroy two targets—a base of operations in Afghanistan and an industrial facility in Sudan—associated with the perpetrators of that attack (Osama bin Laden and al-Qaeda). In a radio address and in a letter to Congress immediately following the military strikes, the President explained that he had determined that the Sudanese facility produced materials for chemical weapons, and that both military operations were intended to disrupt and prevent future attacks and to prevent the acquisition of chemical weapons by terrorist groups. Pet. App. 2a-3a.

Petitioners are the Sudanese corporation that owned the industrial facility and the corporation's sole shareholder, a dual national of Saudi Arabia and Sudan. Petitioners brought this suit approximately two years after the facility was destroyed. Their complaint questioned the correctness of the President's conclusion that the Sudanese facility was a legitimate military target, and it sought $50 million under the Just Compensation Clause of the Fifth Amendment for the United States military's destruction of the property. See Pet. App. 2a-3a, 98a-118a.

2. The Court of Federal Claims (CFC) dismissed petitioners' complaint. Pet. App. 42a-89a. The CFC explained:

> [T]he right to compensation for a taking under the Fifth Amendment does not extend to the destruction of property designated by the President as enemy war-making property, and * * * the Court may not look behind the President's discharge of his Constitutional duties as Commander in Chief, including his declaration of what constitutes an enemy target and

> his determination to use military force to destroy that target.

Id. at 88a.

3. The court of appeals affirmed. Pet. App. 1a-41a.

The court of appeals noted petitioners' concession that relief is not available under the Just Compensation Clause when the United States destroys enemy property in the course of military operations. Pet. App. 14a; see *id.* at 31a. Rather than arguing that the destruction of enemy property through military operations is a compensable taking, petitioners "challenge[d] the government's designation of the Plant as enemy property by, *inter alia*, suggesting that the President relied on flawed intelligence in targeting it for destruction." *Id.* at 23a. The court of appeals held that petitioners' claim was not cognizable because the constitutional authority of the Judicial Branch under Article III "does not encompass judicial supervision over the President's designation as enemy property the private property belonging to aliens located outside the territory of the United States." *Id.* at 24a.

In reaching that conclusion, the court of appeals relied on constitutional principles of separation of powers, and specifically on the political question doctrine. Pet. App. 24a-35a. The court concluded that

> the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered with the aim of determining which assets, located beyond the shores of the United States, belong to the Nation's friends and which belong to its enemies. * * * [T]he Constitution envisions that the political branches, directly accountable to the People, will adopt and promulgate measures de-

> signed to ensure that the President makes the right decision when, pursuant to his role as Commander-in-Chief, he orders the military to destroy private property in the course of exercising his power to wage war. * * * [T]he Constitution does not contemplate or support the type of supervision over the President's extraterritorial enemy property designations the [petitioners] request in this case.

Id. at 31a-32a. The court expressed particular concern that judicial cognizance of petitioners' claims would create "the specter of field commanders vetting before the civil courts the intelligence on which they rely in selecting targets for destruction while simultaneously dealing with the exigencies of waging war on the battlefield." *Id.* at 34a.

The court of appeals also concluded that this Court's recent decisions in *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004), and *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004), do not support petitioners' claim. Pet. App. 38a-41a. The court observed that *Hamdi* and *Rasul* presented questions concerning "the President's decision to hold the detainees indefinitely on soil over which the United States exercises, at the very least, plenary and exclusive jurisdiction." *Id.* at 38a. In the instant case, by contrast, the challenged designation of petitioners' industrial plant as enemy property "was made in view of the President's 'go/no go' decision regarding the use of force in what is deemed to be a foreign theater of war and in the face of what he perceived to be an imminent terrorist attack on the United States." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.[1]

1. Petitioners contend (Pet. 6-8) that the decision below conflicts with this Court's decision in *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004). That argument lacks merit.

a. At issue in *Hamdi* was the ongoing and potentially indefinite detention of a United States citizen who was held within the United States. See 124 S. Ct. at 2635-2636, 2641. In defining the procedural safeguards to which Hamdi was entitled, the plurality emphasized "the fundamental nature of a citizen's right to be free from involuntary confinement

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[1] In addition to the reasons stated in the text, this case is a poor vehicle for considering the question presented because the CFC lacked jurisdiction under the Reciprocity Act, 28 U.S.C. 2502. Under that statute, "[c]itizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the [CFC] if the subject matter of the suit is otherwise within such court's jurisdiction." 28 U.S.C. 2502(a); see *United States* v. *O'Keefe*, 78 U.S. 178 (1870). In the courts below, the government argued that the CFC lacked jurisdiction because the courts of Sudan do not ensure meaningful access by United States citizens seeking to sue the government of that country. The court of appeals rejected that contention, holding that, so long as the courts of Sudan do not discriminate between Sudanese and United States plaintiffs, the requirements of the Reciprocity Act are satisfied, even if both sets of plaintiffs are denied the opportunity to sue the Sudanese government in Sudanese courts. See Pet. App. 12a-13a. That holding is inconsistent with the plain text of the Reciprocity Act. Under the terms of the Act, an alien's right to sue the United States in the CFC depends not on whether the courts of the alien's country of nationality discriminate against United States plaintiffs, but on whether United States citizens are actually afforded "the right to prosecute claims against [the foreign] government in its courts." 28 U.S.C. 2502(a).

by his own government without due process of law." *Id.* at 2647. In the instant case, by contrast, petitioners are foreign nationals who seek retroactive monetary relief for the prior destruction of property located abroad. Nothing in *Hamdi*'s holding or analysis suggests that such a claim is judicially cognizable, much less that a court in such a suit may review and potentially reject the President's determination that a particular facility was enemy property. See Pet. App. 38a.

b. In asserting that the court of appeals' decision in the instant case conflicts with this Court's ruling in *Hamdi*, petitioners principally contend that, "in holding that the President's enemy property designations are unreviewable, the lower court adopted the arguments advanced and rejected in *Hamdi*." Pet. 7. Petitioners' allusion to the "the arguments advanced and rejected in *Hamdi*" refers to contentions based on the President's need as Commander in Chief to conduct military operations without undue judicial interference. See Pet. 7-8. Petitioners' claim of a conflict is misconceived.

The Court in *Hamdi* did not announce a categorical rule that determinations by the President and others in the realm of military affairs are *always* subject to judicial review. To the contrary, the plurality recognized that, "[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." 124 S. Ct. at 2647 (citing *Department of Navy* v. *Egan*, 484 U.S. 518, 530 (1988); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587 (1952)). Indeed, the plurality specifically observed that "initial captures on the battlefield need not receive the process [described in the opinion]; that process is due only when the determination is made to *continue* to hold those who have

been seized." *Id.* at 2649. The military strike for which petitioners seek compensation is far more analogous to an initial battlefield capture than to the continued detention within this country's borders of an alleged enemy combatant.

The plurality opinion in *Hamdi* does make clear that the constitutional and public interest in the President's vigorous conduct of military affairs will not *invariably* outweigh competing constitutional concerns. See 124 S. Ct. at 2648 (concluding that the government's position in that case did not "strike[] the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant"). The Federal Circuit's decision in the instant case, however, is in no way inconsistent with the *Hamdi* Court's recognition of certain constitutional constraints in the context of that case. Just as the Court in *Hamdi* did not hold that the President's military decisions are *always* reviewable, the court of appeals here neither held nor suggested that such decisions are *never* subject to judicial scrutiny. Rather than announce a broad, categorical rule, the Federal Circuit was careful to limit its holding to the circumstances of this case. See, *e.g.*, Pet. App. 39a ("[W]e express no opinion regarding the President's power, inherent or otherwise, to make enemy property designations over property that is located within the territory of the United States."); *id.* at 40a ("We * * * emphasize the limited reach of our holding solely to those extraterritorial enemy property designations the President makes in anticipation of imminent attack on American citizens or military forces.").

c. Even apart from the potential interference with military decisionmaking that adjudication of petitioners' takings claim would entail, petitioners have no rights under the Just Compensation Clause because they are non-resi-

dent aliens and the property that is alleged to have been taken was located in a foreign country. This Court "ha[s] rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)); see *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (explaining that "certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders," and citing *Verdugo-Urquidez* for the rule that the "Fifth Amendment's protections do not extend to aliens outside the territorial boundaries" of the United States). No logical basis exists for treating the Just Compensation Clause of the Fifth Amendment as an exception to that general rule. And petitioners' reliance on the Due Process Clause analysis in *Hamdi* is especially unavailing in light of their own inability to invoke Due Process Clause protections.

2. There is likewise no merit to petitioners' contention (Pet. 9-10) that the decision of the court of appeals conflicts with prior decisions that have addressed takings claims arising from the conduct of military operations. Most of the decisions on which petitioners rely held that the plaintiffs were *not* entitled to compensation for property destroyed in the course of United States military operations. See *National Bd. of YMCA* v. *United States*, 395 U.S. 85, 89-94 (1969); *United States* v. *Caltex (Philippines), Inc.*, 344 U.S. 149, 152-156 (1952); *Juragua Iron Co.* v. *United States*, 212 U.S. 297, 303-311 (1909); *American Mfrs. Mut. Ins. Co.* v. *United States*, 453 F.2d 1380, 1381 (Ct. Cl. 1972). Two of the cases cited by petitioners—*Wiggins* v. *United States*, 3 Ct. Cl. 412, 421-424 (1867), and *Grant* v. *United States*, 1 Ct. Cl. 41, 50 (1863)—in which the Court of Claims awarded compensation for property destroyed during wartime oper-

ations, are no longer good law, since their analysis is inconsistent with this Court's subsequent decision in *Caltex*. See 344 U.S. at 152-156. And *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984), vacated, 471 U.S. 1113 (1985), did not involve a just compensation claim at all, see 745 F.2d at 1505, 1510-1511, and the injunctive relief sought in that case was denied on remand from this Court, see *De Arellano* v. *Weinberger*, 788 F.2d 762, 764 (D.C. Cir. 1986).

Petitioners' claim of a conflict is principally based on the fact that the court of appeals in the instant case invoked the political question doctrine, while courts in other cases have considered on the merits (and typically rejected) takings claims involving the conduct of military operations. See Pet. 9.[2] In holding that petitioners' own claims were barred by the political question doctrine, however, the Federal Circuit did not announce a blanket rule that military action can never give rise to a justiciable takings suit. To the contrary, the court stated that "the government does not avoid the Takings Clause by simply using its military forces as cover for activities that would otherwise be actionable if performed by one of its civilian agencies. Military conduct

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[2] Indeed, petitioners concede that a takings claim cannot be based on the destruction of enemy property, or the destruction of property to prevent its use by the enemy. See Pet. 11 (citing, *inter alia*, *Juragua* and *Caltex*). They contend that the President made an error in concluding that their plant in Sudan was associated with and would be used by al-Qaeda in support of future attacks. A claim based on destruction of property in these circumstances sounds in tort, seeking to hold the United States liable in negligence, or even strict liability, for injuries arising from the allegedly erroneous judgment by the President as Commander in Chief. See *Schillinger* v. *United States*, 155 U.S. 163, 168, 169-170 (1894); but cf. Pet. App. 9a-11a. The Federal Tort Claims Act would not allow recovery on such a claim. See, *e.g.*, 28 U.S.C. 2680(a), (j), and (k).

that does not touch on the destruction or appropriation of enemy property can sometimes give rise to a valid takings claim." Pet. App. 14a. Rather than adopting a broad rule of non-justiciability applicable to military affairs generally, the court held only that the President's designation of particular overseas installations as "enemy property" was not subject to judicial review. See, *e.g.*, *id.* at 35a ("[T]he Constitution, in its text and by its structure, commits to the President the power to make extraterritorial enemy property designations such as the one made regarding the [petitioners'] Plant."). Petitioners cite no decision that has held or suggested that a Presidential determination of this nature, relying on confidential intelligence sources, may be second-guessed by a court.

Petitioners' reliance (Pet. 10-11) on prize cases and on the Trading with the Enemy Act, see 50 U.S.C. App. 9, is similarly misplaced. The law of prize, including the susceptibility to judicial review of a junior naval officer's assessment of the character of an enemy vessel, does not undermine the President's authority as Commander in Chief under Article II. See Pet. App. 33a, 37a-38a. Likewise, the fact that Congress has authorized judicial review of certain administrative designations, themselves made pursuant to the authority of a comprehensive statutory scheme administered by civilian officials, in no way suggests that courts can or should review the President's military decision to target and destroy property located outside the United States that he determines to be a threat to this Nation's security.

Finally, there is no basis for petitioners' assertion (Pet. 12) that judicial cognizance of claims such as theirs would "not adversely affect military decisionmaking." As the court of appeals recognized, it is unclear "how a military commander, much less the Commander-in-Chief, could

wage war successfully if he did not have the inherent power to decide what targets, *i.e.*, property, belonged to the enemy and could therefore be destroyed free from takings liability." Pet. App. 29a; see *id.* at 31a-35a, 38a-41a. The court properly declined "to add to the President's calculus concerns regarding takings liability when he exercises his power as Commander-in-Chief to wage war on behalf of the country under the circumstances that obtained in this case." *Id.* at 38a-39a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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